Appeal Nos. 16,410, 16,411

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY A. PURSCHE,

Appellant,

vs.

ATLAS SCRAPER AND ENGINEERING CO., a Corporation,

Appellee,

ATLAS SCRAPER AND ENGINEERING CO., a Corporation,

Appellant,

vs.

HARRY A. PURSCHE,

Appellee.

BRIEF FOR THE APPELLEE ATLAS SCRAPER AND ENGINEERING CO.

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Introduction.

The party Harry A. Pursche, in his Opening Brief, argues three points:

The Trial Court erred:

(a) In finding that Patent No. 2,625,090 was not infringed by Atlas plows of Exhibits 20, 21 and 23;

(b) In holding claim 1 of Patent 090 to be invalid; and

(c) In failing to award costs to Pursche.

The party Atlas shall answer these three arguments in this same order.

THE TRIAL COURT DID NOT ERR IN HOLDING THE 090 PATENT NOT INFRINGED BY THE ATLAS PLOWS OF EXHIBITS 20, 21 AND 23.

The Trial Court found that the Atlas B-3, B-4, B-6 and B-7 plows disclosed in Exhibits 20, 21 and 23 did not infringe because the plows use a different combination, and stated "the combination is different in that it works differently, particularly with the two wheels riding on unplowed ground and particularly with the eccentric mounting of the plows" [Find. 29, R. 76].

This Finding is a Finding of Fact. The Trial Court attended field demonstrations and saw in operation the plow of the 090 patent shown in Exhibits 25-A, to 25-G (not in Exhibit book), and also the B-3, B-4, B-6 and B-7 plows shown in Exhibits RR-1 to 8, SS-1 to 9, and TT-1 to 6 (not in Exhibit book). From the testimony in this case and from the personal observations, the Trial Court determined that these Atlas plows had a different mode of operation from the plow of the 090 patent.

Pursche Has the Burden of Convincing This Court That Finding 29 Is Clearly Erroneous.

Although recent decisions lean toward the proposition that infringement is a mixed question of law and fact, it is believed that in the present case Finding 29 is one of fact because it finds non-infringement because of a different combination and different mode of operation. In *Kwikset Locks v. Hillgren* (C. A. 9, Feb. 3, 1954), 210 F. 2d 483, this Court said:

> "* * * While it is true that a district court's finding of infringement is generally considered to be a finding of fact that may not be set aside unless clearly erroneous, 'it is (also) well settled that where,

as here, there is no dispute as to the evidentiary facts, and the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process, the question of infringement resolves itself into one of law depending upon a comparison between the two processes and the correct application thereto of the rule of equivalency. * * *" (Pp. 488, 489.)

In September of 1959, in *Moon v. Cabot Shops, Inc.*, 270 F. 2d 539, 545, this Court of Appeals for the Ninth Circuit said:

"The factual finding of the trial court that the accused devices are not equivalent to the patent claims, as so construed, is not to be disturbed unless clearly erroneous. Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U. S. 605, 610, 70 S. Ct. 854, 94 L. Ed. 1097. We find no clear error in the making of this finding."

Also see *Martin v. Be-Ge Mfg. Co. of Gilroy* (C. A. 9, 1956), 232 F. 2d 530, 532, and authorities cited therein.

Pursche Has Not Shown That Finding 29 Is Clearly Erroneous, and His Argument Is Untenable.

Pursche, on page 10 of his Opening Brief, admits that it is true that such Atlas plows:

"(a) have carriage wheels which always roll upon unplowed ground, and do not alternately roll in the furrow, and

(b) the plow shares are 'eccentric' in their mounting in that they are not symmetrically positioned on both sides of the carrier axis,"

but asserts that these differences are immaterial because they do not affect the patented combinations set forth in the claims. Pursche states "The plows do not 'work differently' but on the contrary work exactly as described in the claims."

The Trial Court held that the new style Atlas plows worked differently and it was on the basis of **different mode of operation** that the Court found the Atlas B-3, B-4, B-6 and B-7 plows did not infringe the 090 patent

The Finding of non-infringement was *not* on the basis that the claims did not read on the Atlas plows. When the Trial Court said that the plows "use a different combination," the Court obviously meant that the elements of the plows and their functions and cooperation were different from those *embodied in* the 090 plow.

The sole basis of Pursche's argument that the Trial Court erred, is that the wording of the claims read on the Atlas plows; and there is no argument nor facts presented to show that the Trial Court was wrong in finding non-infringement because of a different mode of operation.

Infringement Is Not a Mere Matter of Words.

The two leading cases of this Circuit on this point are:

Grant v. Koppl, 99 F. 2d 106, 110;

McRoskey v. Braun Mattress Co., 107 F. 2d 143, 147.

The following language in *Grant v. Koppl* applies on all fours to this case:

> "We note that appellant contends that the claims of the patent in suit read upon appellees' device. We may assume that this is true, especially as to claim 9. But infringement is not a mere matter of words.

(authorities cited) Here, we hold that the mode of operation is different and that there is no equivalency of means. It is not necessary to discuss the claims separately or in detail. * * *" (p. 110.)

In later sections the party Atlas will clearly show the Court the difference in mode of operation and will make a further discussion of the law.

It is of real significance that Pursche does not make a single reference to any testimonial evidence to support his position. In fact, all of the evidence is to the contrary. The testimony of Ogle, Jr. and of the expert witness Fishleigh, clearly establishing that the new style Atlas plows have a different mode of operation, stands unrebutted by any evidence.

The party Pursche has failed to show that the Trial Court was clearly wrong in its Findings.

THE ATLAS B-3, B-4, B-6 AND B-7 PLOWS OF EXHIBITS 20, 21 AND 23 DO NOT INFRINGE THE 090 PATENT BECAUSE OF A DIFFERENT MODE OF OPERATION AND NON-INTERCHANGEABILITY AND NON-EQUIVALENCE OF ELEMENTS.

Although Pursche has utterly failed to make any showing that Finding 29 is clearly erroneous; the party Atlas will show the complete unanimity of the law and facts which conclusively establish that the Finding on non-infringement is supported by substantial evidence, and is correct and should be sustained.

THE FACTS ON WHICH THE TRIAL COURT HELD DIFFERENT MODE OF OPERATION.

The Atlas plows of Exhibits 20, 21 and 23 have a construction and mode of operation of the plows shown in

the Chandler, *et al.* Patent No. 2,830,519 [Ex. AR, R. 1527], which patent for convenience is attached hereto as Appendix 1. The witness Ogle, Jr. described the construction and mode of operation of these non-infringing plows and for this purpose prepared Exhibits AS [R. 1537] AT-1 and AT-2 [R. 1538-1539].

The 519 patent [Ex. AR] may be referred to for a detailed description of these plows, but for the purpose of explaining the structural features pertinent to their different mode of operation and for pointing out the different mode of operation between these Atlas plows and the 090 plow, reference will be made to diagrammatic drawings attached to this Brief as Appendices 2, 3 and 4 which include diagrammatic views resembling views of Exhibits AS and AT-1 and AT-2. Also, in describing these machines, the reference numerals used by the witness Ogle, Jr. in his testimony commencing in the Record on page 1142, will be employed.

As shown in the upper view in Appendix 2, which is illustrative of the B-3, B-4, B-6 and B-7 plows, the numeral 1 represents a tractor which has tracks 2 and 3, which operate on unplowed ground [R. 1150]. A drawbar is connected to the tractor at point 4; the line of draft or line of pull on the plow is indicated by the numeral 5 and this tractor drawbar being freely pivotal always points or extends along this line. The new style Atlas plows have a tongue 29* which is connected to the tractor drawbar at 6. The plow tongue has two diverging rails 7 and 8, one of which always points toward the center of draft of the gang of plows doing the plowing [R. 1151].

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*Numerals added to Exs. AS, AT-1 and AT-2, are written with an underscore, thus "29".

When the plow is in the position indicated by full lines in Exhibit AS, the bar 7 of the tongue lies along the draft line 5 which extends through the center of draft 40. When the plow is plowing in an opposite position, the side rail 8 lies along the dotted draft line 42 which extends through the center of draft 41 [R. 1152].

It will be noted that the line of draft 5 and the dotted line of draft intersect each other at the point 6. The line 18 which is drawn in the direction of travel of the plow passes through this same point and it is along this line that the longitudinal beam 50 of the plow is extended. Also, it is around this longitudinal line or axis 18 that the entire plow carrier 17 rotates [R. 1152].

The tongue, including the side rails 7 and 8, is pivoted at its rear end to a cross-shaft 11 and secured at the opposite ends of the cross-shaft 11 is a right-hand crank 12 and a left-hand crank 13, on which crank or wheel arms, the wheels 14 and 15 are rotatably mounted [R. 1154].

Pivotally connected to the cross-shaft 11 is a frame 16, and connected to the frame 16 is the longitudinal beam 50 on which the carrier 17 is rotatably mounted.

Although it might appear that the plow is unbalanced, the witness Ogle, Jr. pointed out that it is, in fact, dynamically balanced force-wise, and his explanation of this is given starting [R. 1155].

It will be noted that each center of draft 40 and 41 is laterally offset from the longitudinal axis of rotation 18. When the carrier is rotated from full-line position to bring the left-hand gang of plows 20 into operating position, as indicated by dotted lines, the carrier 17 rotates around the longitudinal axis 18 and swings the carrier

into an eccentric position on the opposite side of this longitudinal line 18. When the parts are in this new position the line of draft is along the dotted line 42, and the center of draft is positioned on this dotted line at 41.

Based on this new concept [R. 1142] the entire plow structure, with the exception of the carrier 17 and parts supported thereby, remains in the *same* position behind the tractor, and more particularly, the tongue and the frame and the wheels and the longitudinal beam **do not shift laterally. These parts continue to occupy the same position on unplowed ground rearward of the tractor.**

This mode of operation is different from that in the 090 patent. A description of the construction and mode of operation of the 090 plow was given in the Party Atlas' Opening Brief, page 20, and was illustrated in Appendix A. Appendix A shows the manner in which the entire plow assembly shifts from a position on the right of the tractor to a position on the left of the tractor. In Exhibit AS, Appendix 2, in the lower view, this action is diagrammatically illustrated to show the magnitude of lateral movement of the *entire plow assembly* when the plow is shifted from one plowing position to the opposite plowing position. The witness Ogle, Jr.'s explanation of this action is found starting R. 1159 of the printed Record. Similar parts are indicated by the same numeral but using a prime after it.

Referring to the lower drawing in Appendix 2, the tractor 1′, has a right track 2′ and a left track 3′. The center of the drawbar pivot is indicated at 4′, and the line of draft extending through this point 4′ to a center of draft 40′ is indicated by the numeral 5′.

The 090 plow has a horizontally swingable tongue which is designated by the numeral 7′, this tongue being

pivoted at the forward end of the frame of the plow as designated at 16′. The center line of the frame is a longitudinal line 18′ on which the longitudinal beam 50′ of the plow is mounted. It will be noted that the center of draft in the Pursche plow indicated at the point 40′ **is located on this longitudinal axis 18′ of the longitudinal beam 17′.**

When the carrier is rotated to bring the left-hand plows into operating position as shown by dotted lines, the tongue 7′ is swung horizontally into the dotted line position, and the center of draft will be located along the broken line 42′. Because the center of the draft is on the longitudinal axis 18′ there must be a lateral shifting of the *entire plow assembly* from the full-line position behind the tractor on the right-hand side to the dotted-line position behind the tractor on the left-hand side.

This basic new concept of the new type Atlas plows which places the centers of draft 40 and 41 eccentric of the longitudinal axis 18, and the tongue with the diverging rails which lie along the lines of draft 5 and 42, provide a new mode of operation. It enables accomplishing a number of new results, one of which is the placing of the plow directly behind the tractor with wheels 14 and 15 running on unplowed ground.

Because of the design which allows both front wheels to run on unplowed ground numerous important advantages are achieved.

1. Atlas can obtain a full furrow depth on the first run [R. 541], whereas in the Pursche plow, because one wheel rides in a furrow a full depth of furrow cannot be plowed for three to five runs of the plow. Pursche said, "You can't get it down to the depth of the plow

right away, it takes about three or four or five passes to get it down to the required depth. * * *" [R. 233]. Atlas thus has full depth plowing across the entire plowed area. A related advantage is that in the Atlas plow the depth of cut can be changed at any place in the field [R. 542].

2. The Atlas plow can straighten a furrow at any time because the wheels run on unplowed ground [R. 542]. On the other hand, because of the Pursche plow having one wheel down in the furrow "* * * it might take you 15 or 20 rounds to get that field straightened out again. It is a very difficult problem." [R. 542].

3. Because both wheels run on unplowed ground, the plow will run evenly, whereas in the Pursche plow unevenness is caused by reason of clods falling into the furrow in which the wheel is running [R. 218-219].

4. Further advantages accrue to the Atlas plow because of a simple depth adjustment as compared to the Pursche three adjustment requirements [R. 217]. Also, there is no cross-wise leveling [R. 538-539] because both wheels ride on level ground, whereas in the Pursche plow there is a change in cross-wise leveling of the frame for each depth of furrow. In addition, since the axles extend horizontal and the wheels rotate in a vertical plane, there is no side loading such as occurs in the Pursche plow [R. 538-539].

Exhibit AT-1 [R. 1538] illustrates the new mode of operation of the new style Atlas plows in planing into the ground to plowing action and planing out of the ground to a raised position. This new mode of operation is described by the witness Ogle, Jr. commencing on page 1171 of the Record.

Referring to Appendix 3, which includes diagrammatic views of Exhibit AT-1 the witness Ogle, Jr. states that this exhibit includes four numbered sketches 1, 2, 3 and 4, which schematically illustrate a plow of the three-bottom B-4 type [R. 1171].

Fig. 1 discloses the plow in a lifted position, in which the wheels 14 and 15 are on unplowed ground and the gang of plows 19 are above the ground level.

The structure diagrammatically illustrated is that disclosed in the upper view in Exhibit AS, Appendix 2, except that the plow is a three-bottom rather than a four-bottom plow. The vertically swingable tongue 29 is pivotally connected at 6 to the draft link of the tractor 1. The rearward end of the tongue 29 is pivotally supported on the cross-shaft 11, which carries the arms 12 and 13 at opposite ends thereof, on which arms wheels 14 and 15 are rotatable.

Connected between the tongue 29 and the shaft 11 is a hydraulic cylinder and piston arrangement 32, the details of which are shown in Exhibits 20, 21 and 23, and also in the patent Appendix 1, which covers the new design of Atlas plows.

When it is desired to perform a plowing operation, the cylinder and piston arrangement 32 is extended and allows the frame to pivot from the position shown in Fig. 1 into the position shown in Fig. 2 [R. 1171]. It will be noted that this action is an action in which the frame 16 and longitudinal beam 17 are pivoted around the cross-shaft 11 to tilt the plowshares 19 into a position shown in Fig. 2, in which the plowshares will plane into the ground. This tilting action, it will be noted,

lowers the foremost plowshare 19a so that it starts to enter the ground while the other two plowshares are above the ground but angled in a downward direction.

As explained by the witness Ogle, Jr., during this entering action the wheel 14 may raise from the ground, the load being carried by the wheel 15 and the plowshares 19. As explained in the note below Fig. 2, this gives the same type of entry of the plows as in the old walking plow, and this gives extremely fast and easy penetration [R. 1171].

When the plows have fully entered the ground and are in full-depth plowing position, the parts of the plow occupy the position shown in Fig. 3. Because of the fact that in the new type Atlas plows the tongue is a free floating tongue, it may have a relatively large vertical pivoting action between the two broken lines, as indicated in Fig. 3, and in this way any unevenness of the ground being traveled over by the tractor is not transferred to the plow [R. 1172].

Fig. 4 illustrates the manner in which the plow is removed from the ground. The action which takes place is explained by the witness Ogle, Jr. [R. 1172]. It will be noted at this time that the frame 16 and carrier 17 are tilted relative to the tongue 29 in an opposite direction from that shown in Fig. 2. By this type of tilting action the forward end of the gang of plows is raised upward relative to the rearward end so that the plows tend to plane out of the ground as illustrated in Fig. 4.

The final position of the plow when the shares 19 are removed from the ground, is the position shown in Fig. 1.

It is important to note that the frame 16 and longitudinal beam 50 hinge around the axis of the cross-shaft 11

which is at a point near but slightly to the rear of the centers of the wheels 14 and 15. It will also be noted that the tongue 29 is swingable only in a vertical plane and that this tongue is swingable relative to the cross-shaft 11 and also relative to the frame 16 and longitudinal beam 50. By reason of this arrangement of the vertically pivoted tongue, the frame and longitudinal beam and the connecting of the single hydraulic cylinder 32 between the tongue 29 and the shaft 11, it is possible to tilt the forward end of the longitudinal beam into the position shown in Fig. 2 so that the plows will plane into the ground and it is also possible to tilt the longitudinal beam 50 as shown in Fig. 4 in order that the plows 19 will plane out of the ground. It will be noted that the tilting action of the longitudinal beam 50 is around the axis of the cross-shaft 11, which is near the forward end of the longitudinal beam 50. It will be noted that this tilting action is operable, *first,* to tilt the forward end of the beam so that it points downwardly, as in Fig. 2, or, *second,* to point the forward end of the beam upwardly relative to the rearward end so that it points upwardly as shown in Fig. 4.

On Exhibit AT-2 [R. 1539] Appendix 4, the witness Ogle, Jr. has made schematic views illustrating the manner in which the Pursche plow of the 090 patent enters and leaves the ground and he has also included a series of diagrams for showing the difference in mode of operation of these two plows with respect to these features. The witness's description of Exhibit AT-2, starts in the Record, page 1173.

Referring to Appendix 4, the first Fig. which has been marked Fig. 1, shows the position of the parts of the 090 plow when they are in a carrying position. In

this position the frame is raised relative to the wheels 13 and 14. In these Figs. of the 090 plow the numerals of the 090 patent have been added so that if desired the party Atlas' description of this plow commencing in the Opening Brief, page 20, may be resorted to for additional details.

The frame 12 is a rigid frame and the longitudinal beam 26 on which the plow carrier is rotatable is rigidly connected to the frame 12. A horizontally swingable tongue 70 is pivotally secured at 73 to the frame 12 and is also connected to the draft link of the tractor as indicated at 91.

This tongue 70 must be horizontally swingable in order to permit the shifting of the entire plow from one side to the other. However, the tongue cannot move in a vertical direction relative to the frame 12. As shown in the drawings of the 090 patent [R. 1549] the tongue is bifurcated so that a wall extends above and below the frame 12 and permits only a horizontal swinging of the tongue.

The beam 26, the frame 12 and tongue 70 are rigid in a vertical plane. There is no hinge point near the forward end of the longitudinal beam 26, such, for example, as the hinge point 11 in the new style Atlas plow. When the wheels 13 and 14 are moved relative to the frame 12 the beam, the frame and the tongue act as an integral rigid beam and hinge or tilt around the forward end of the tongue.

This is a vital difference from the new style Atlas plows in which the frame pivots around the cross-shaft 11 which is positioned near the forward end of the longitudinal beam 50 between the frame and the tongue 29.

The second sketch, marked Fig. 2, shows the 090 plow in plowing position. In view of the fact that the plow structure pivots around the forward end of the tongue as the frame and beam are lowered from the position shown in Fig. 1 into the position shown in Fig. 2, the angularity of the plows 17 to the ground diminish from the maximum angle in Fig. 2 into a substantially zero angle in Fig. 2 [R. 1173].

The witness Ogle, Jr. states: "Since the Pursche construction is a rigidly constructed unit from front to back in the elevation view, as the unit is lowered the angle of approach gets shallower as it approaches the ground." [R. 1174]. Thus it will be seen that in the lowering of the plows into the ground instead of tilting the plows so that they will plane into the ground, the plows are swung in an opposite direction and, therefore, do not plane into the ground as is the case with the new style Atlas plows, but are forced into the ground by the weight of the structure.

In the view on the right, which has been identified as Fig. 3, the action which takes place when the plow is raised from the ground, is illustrated. The witness Ogle, Jr. explains [R. 1174] that since the two wheels 13 and 14 are independent of each other, one will move relative to the other and the cylinder with the least load will always act first. In view of this, the initial action which occurs when the plow is moved from plowing position is "to point the shares in a downward direction because the entire structure is a rigid form of structure in the elevational view" [R. 1174]. As the wheels are lowered relative to the frame, which causes the frame to raise since the wheels are running on the ground, the action is to tilt the entire structure around the *forward end* of the

tongue 70. The parts of the plow will be moved from the position shown in Fig. 3 into the position shown in Fig. 1.

Now it will be noted that as this rigid structure of tongue 70, frame 12 and longitudinal beam 26 is titled around the forward end of the tongue 70, it is the rearward end of the longitudinal beam 26 which moves the greatest distance. As the plowshares 17 are raised from Fig. 3 to Fig. 1, the shares are gradually tilted into a steeper and steeper adverse angularity. This tilting of the plowshares causes a tendency for them to plane into the ground which is exactly the opposite action from that which is desired. The witness Ogle, Jr. explains this action as follows:

> "Now, when these shares point down on this initial movement this causes a tendency for the shares to want to dig deeper if the tractor is traveling forward. So consequently they resist the effort to raise them out of the ground.
>
> In addition to that, there is a superimposed soil load which must be pried loose, and that is carried up by the plow bases, so that the whole structure is pivoted around the tongue of the tractor and pried up around the wheels and rotates around the connecting point to the tractor." [R. 1175].

Schematic views A, B, C and D of the new style Atlas plows and schematic views E and F of the Pursche 090 plow are described briefly by the witness Ogle, Jr. in the Record 1175-1176.

To see the vast difference in operation of the two plows, it is only necessary to compare the views of Exhibit AT-1, Appendix 3, to the views of Exhibit AT-2, Appendix 4. The 090 plow lacks the mode of operation

resulting from the positioning of the hinge or pivot at 11 between the frame 16 and the vertically swinging tongue 29 in combination with the single hydraulic cylinder 32 mounted on the tongue and operatively connected to the cross-shaft 11.

Pursche's rigid structure, that is, rigid in a vertical plane, prevents the tilting action to feed the plows into the ground as shown in view 2 on Exhibit AT-1, and prevents the tilting in an opposite direction to feed the plowshares out of the ground as illustrated in view 4 on Exhibit AT-1.

At no time in the operation of the 090 plow is it possible to tilt the longitudinal beam 26 at a point near its forward end and to the rear of supporting wheels 13 and 14 to obtain the feed-in and feed-out positions illustrated in Figs. 2 and 4 of Exhibit AT-1.

All of the legends on the Exhibits AS, AT-1 and AT-2, are those put on the Exhibits by the witness Ogle, Jr. and constitute a part of his testimony.

The witness Ogle, Jr. states that the advantages of the new Atlas plows in planing into and out of the ground is the fast entering and reduction of high degrees of stress in the individual members of the structure. The method of planing out reduces the load imposed on the members considerably [R. 1176]. And, in his next answer, the witness explains the manner in which during feeding-in and feeding-out the plowshares resting on the floor of the furrow take a portion of the load [R. 1176-1177].

The Law of Different Mode of Operation.

The law of different mode of operation is stated in 69 C. J. S. 861, Section 292, as follows:

> "* * * a machine or device which performs the same function or accomplishes the same result by substantially different means, or by a substantially different principle or mode of operation or in a substantially different way does not infringe the patented invention."

This proposition of law is expounded in many Supreme Court and Lower Court decisions. For example, in *Union Paper Bag* case, 97 U. S. 121, the Supreme Court said:

> "* * * devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result." (P. 125.)

Walker on Patents, Dellers Edition, Volume 3, Section 496, page 1750, gives a comprehensive analysis of the law, and discusses six Supreme Court decisions.

The Ninth Circuit in *Air Devices, Inc. v. Air Factors,* 210 F. 2d 481, 483, said:

> "The fact that the two devices accomplish the same result, or perform the same function, settles nothing about infringement. (Authorities cited). Identity of result is no test. Stebler v. Porterville Citrus Ass'n, 9 Cir., 248 F. 927. As the results obtained are not secured by the same means, or by a device operated in the same manner, or in substantially the same manner, the several devices are not equivalents. Leishman v. Associated Wholesale Electric Co., 9 Cir., 137 F. 2d 722, 727."

The comparison of the new style Atlas plows and the 090 plow show most emphatically that the new style Atlas plows are a different combination having a different mode of operation from the 090 plow.

The Trial Court correctly found non-infringement even though the words of the claims were broad enough to read on the new style Atlas plows, since infringement is not a mere matter of words. See section of this Brief entitled "Infringement is Not a Mere Matter of Words" page 4.

Furthermore the Trial Court was correct in interpreting the claims in accordance with the well established principle stated in *McRoskey Mattress Co. v. Braun,* 107 F. 2d 143, wherein the Court said:

> "Whether the mattress depressing members of the frames described in the claims are conical-shaped or not, the claims do not state, but, since conical-shaped mattress depressing members are the only ones mentioned in the specification, it must be assumed that the mattress depressing members of the frames described in the claims are likewise conical-shaped. For the claims must be read in the light of the specification. Henry v. Los Angeles, 9 Cir., 255 F. 769, 780." (P. 146.)

The Court then, after citing *Grant v. Koppl,* stated:

> "* * * The evidence shows conclusively that, properly construed, the claims in suit were not infringed by appellee. That being so, it is immaterial —if true—that some of the claims read upon appellee's machine." (P. 147.)

THERE CAN BE NO INFRINGEMENT BECAUSE THE ELMENTS OF THE NEW STYLE ATLAS PLOWS ARE NON-INTERCHANGEABLE WITH AND NON-EQUIVALENT TO THE ELEMENTS OF THE 090 PLOW.

Law of Non-Infringement Where There Is Non-Interchangeability and Non-Equivalency.

The law abounds with authorities for this proposition. One Supreme Court decision and three Ninth Circuit Court decisions will be referred to.

The Supreme Court in *Miller v. Eagle Manufacturing Co.*, 151 U. S. 186, 208 stated:

> "The specific device described in and covered by the Wright patent could not be used in the appellants' combination, nor the appellants' spring in the appellees' combination. This interchangeability, or non-interchangeability, is an important test in determining the question of infringement. *Prouty v. Ruggles,* 16 Pet. 336; *Brooks v. Fiske,* 15 How. 212; *Eames v. Godfrey,* 1 Wall. 78."

In the Ninth Circuit, the following decisions are of interest:

> *Craftint v. Baker,* 94 F. 2d 369 at page 373 held:
>
> "* * * To infringe there must be identity of process or combinations of materials used with those described in the patent, *or their equivalents.* * * *" (Emphasis added.)

Leishman v. Associated Wholesale Electric Co., 137 F. 2d 722, 727, held:

> "* * * The plungers perform a part, and only a part, of the function performed by appellant's

levers F and 66. The part so performed is not performed in the same way, or in substantially the same way. Hence the plungers and the levers are not equivalents."

Wire Tie Mach. Co. v. Pacific Box Corporation, 102 F. 2d 543, held at page 556:

"* * * we feel that the ring gear of the Eby machine cannot be said to be the mechanical equivalent of the revolving arm of Parker '259. We therefore hold that the Eby machine does not infringe any of the claims in suit of Parker '259."

The vertically swinging tongue of Atlas and the horizontally swinging tongue of Pursche are non-interchangeable.

In the Atlas structure it is essential that there be a vertically pivoted connection immediately ahead of the forward end of the longitudinal beam, that there be a pivotal connection between the rearward end of the vertically swinging tongue and cross-shaft, and that there also be a pivotal connection between the cross-shaft and the frame.

In the Pursche structure the tongue cannot swing vertically because it must present in conjunction with the frame and the longitudinal beam, **one rigid construction** so that when the frame is raised the front end will be held from vertical movement and the parts will be tilted into the position, for example, as shown in Fig. 5 of the 090 patent.

This non-swingability of the tongue in a *vertical* plane is accomplished by bifurcating the tongue in order that horizontal walls are presented which permit hori-

zontal swinging movement but prevent vertical swinging movement of the tongue relative to the frame.

In the Pursche 090 structure the tongue *must be horizontally swingable* so that the entire plow can be laterally shifted from a right-hand offset position behind the tractor to a left-hand offset position behind the tractor in order that the two plowing operations may be performed.

In the Atlas structure the tongue must *not* swing horizontally because each of the side rails of the tongue must lie along the line of pull during the right-hand and left-hand plowing operations. Also, since the power cylinder is connected to the tongue a swinging of the tongue laterally from one position to another would prevent proper operation of the cylinder because you would always be changing the distance between the point of connection of the cylinder to the tongue and the mechanism operated by the piston rod extending therefrom.

The power cylinder mounted on the tongue of Atlas and the two-power cylinders independently mounted on the frame of Pursche are non-interchangeable.

In the Atlas plow the power cylinder *must be mounted on the tongue* to accomplish the new mode of operation previously discussed. In the 090 plow the power cylinders cannot be mounted on the tongue for various reasons. In the first place, since the 090 tongue is horizontally swingable a connection of the power cylinder to the tongue is impossible. Also, the 090 structure must have two independently adjustable power cylinders, one for each wheel in order that the lateral tilted position of the frame may be set for each independent depth of cut.

The Pursche plow must have *two power lift cylinders on the frame,* one for independent adjustment of each

wheel, whereas the Atlas structure must *not* have any power cylinder on the frame because such an arrangement would defeat its new mode of operation.

A single power cylinder is possible in the Atlas structures because the two wheels are mounted on arms which are secured to the cross-shaft and these two wheels act as a unit [R. 543]. They are secured together and must move in unison. This structure is made possible due to the fact that the plow is always running on unplowed ground whether the plows are in the ground or in a raised position. You, therefore, never have to make any independent adjustments of the wheels because of transverse tilting of the frame.

In the Pursche plow, on the other hand, where the frame operates in a transverse tilted position and in which separate wheel adjustments must be made, *the wheels must be separately mounted,* they do not raise in unison and there must be two lift cylinders, one for each wheel [R. 544].

Numerous advantages result from the unique arrangement of the tongue vertically pivoted at its rearward end and the hydraulic cylinder mounted on the tongue. One important advantage is that in the Atlas arrangement it is not necessary for the cylinder to support the frame in any way during plowing operation. The cylinder can rest free without any load on it [R. 543].

Also, when the plow is in plowing position the cylinder does not interfere with the free vertical swinging movement of the tongue [R. 543]. Because of this important feature, if there is any unevenness of the ground over which the tractor is moving, the oscillating movement of the tractor is not transferred to the plow.

In the Atlas plow the hinging relationship immediately ahead of the forward end of the longitudinal beam between the tongue and the frame and the rigid frame and tongue arrangement of Pursche are non-interchangeable.

In the Atlas plow there must be a hinging action immediately ahead of the longitudinal beam in order to get the planing in and planing out action illustrated in Exhibit AT-1, Appendix 3.

On the other hand, in the 090 plow, the frame and tongue and longitudinal beam must be a rigid structure in a vertical plane in order to obtain the tilting action from the forward end of the tongue which lifts the entire length of the beam member. Substituting the rigid arrangement of Pursche for the hinging tongue and frame arrangement of Atlas is impossible and would entirely destroy the new mode of operation of the Atlas method of planing in and planing out of the ground by raising or lowering the forward end of the longitudinal beam relative to the rearward end thereof.

From the foregoing it is believed to be clearly established that the Atlas plows are a different combination and have a different mode of operation and that the essential elements of Atlas and Pursche are non-interchangeable and non-equivalent.

As a result of the new combination of the Atlas plows many parts corresponding to those of the 090 plow are not necessary. The expert witness Fishleigh [R. 995-1004] makes a comparison of the Atlas new style plow and the plow of the 090 patent from the standpoint of parts which have been eliminated [R. 1005]. The witness Fishleigh has identified the parts which have been

eliminated by giving the numbers of these parts in the 090 patent. A comparison of the Atlas and Pursche plows shows the remarkable simplicity of the Atlas new-style plows resulting from the unique conceptions resulting in the new combination and the new mode of operation.

In view of the foregoing, it is respectfully submitted that not only has the party Pursche failed to make the required showing necessary to have this Court reverse Finding of Fact 29, but the party Atlas has, in this section, convincingly shown that the evidence in the case more than adequately supports the Finding that the Atlas new-style plows comprise a new combination of elements having a different mode of operation from the plow disclosed in the 090 patent.

THE ISSUANCE OF PATENT 519, EXHIBIT AR [R. 1527] WHICH COVERS THE NEW STYLE ATLAS PLOWS, RAISES A PRESUMPTION OF NON-INFRINGEMENT.

The new style B-3, B-4, B-6 and B-7 Atlas plows of Exhibits 20, 21 and 23 are disclosed in and are covered by the 519 patent, Exhibit AR [R. 1527].

Starting in the Record at page 1139, the witness Ogle, Jr. describes the patent and points out wherein it discloses and claims the new style Atlas plows.

The Pursche 090 patent was cited as a reference and the claims were allowed over this patent [R. 1140].

The claims of Exhibit AR cover the new combinations of elements embodied in the B-3, B-4, B-6 and B-7 plows.

The basic combination of the vertically swinging tongue with the power cylinder mounted on the tongue is defined by claims 1 and 3 of that patent. The structural

arrangement which enables the plowshares to plane in the ground and out of the ground is defined in claims 5, 6 and 7.

The unique combination of the front wheels rolling on unplowed ground resulting from the use of the eccentrically mounted gangs of plows coupled with the vertically pivoted tongue (and which cannot swing horizontally) in conjunction with the designing of the tongue in the shape of an A-frame, and the placing of one leg of the A-frame in one line of draft and the other leg of the A-frame in the other line of draft when opposite plowshares are in operation, are covered in different degrees of broadness by all of the claims.

The combination of the vertically swingable *free-floating* tongue is defined by claims 4 and 11.

The bypass arrangement which gives the vertically pivoted tongue its freedom of vertical movement is defined in claim 12.

Not only do the new style Atlas plows have a different combination and mode of operation, but these differences are of a patentable character and, therefore, carry a special significance.

There are a number of Ninth Circuit cases and Supreme Court cases which state that the issuance of a patent covering a structure charged to infringe, raises a presumption of non-infringement. This presumption is not necessarily an irrebuttable presumption. But, in the present situation, where the differences are great and where the combination of elements is a different combination having a different mode of operation, it is believed that the presumption of non-infringement is a strong presumption and more difficult to rebut.

Certainly in this case there is no evidence which in any way seeks to or has the effect of rebutting this presumption.

The law on this subject finds its basis in a number of decisions, and particularly in the following:

Corning v. Burden, a decision of the Supreme Court of the United States, 56 U. S. 252, 271;

Ransome v. Hyatt (C. A. 9), 69 Fed. 148;

Western Well Works v. Layne & Bowler Corporation (C. A. 9), 276 Fed. 465, 472;

Mastoras v. Hildreth (C. A. 9), 263 Fed. 571, 575 on certiorari before the Supreme Court, 257 U. S. 27, 36 and 37;

Dunkley v. Central California Canneries (C. A. 9), 7 F. 2d 972, 977.

THE TRIAL COURT DID NOT ERR IN HOLDING CLAIM 1 OF THE 090 PATENT TO BE INVALID.

Claim 1 is a broad claim directed to an aggregation of parts including a single supporting wheel of the type disclosed in the Unterilp Patent, Exhibit A-79 [R. 1491]. The claim is invalid for the various reasons pointed out in the party Atlas Opening Brief with respect to claim 3, which is representative of the group of claims 1 to 4 inclusive, 14 and 17. See the Atlas Opening Brief page 80.

Claim 1 includes the following elements:

1. The frame,
2. The carrier,
3. The right and left-hand plows,
4. The means for rotating the carrier, and
5. The rear supporting wheel.

This is but five of the twelve necessary elements of the 090 plow. See Appendix C of the Party Atlas Opening Brief.

Claim 1 is invalid because it is incomplete and inoperative, for the reasons pointed out in the FIRST POINT of the Party Atlas Opening Brief commencing on page 52.

Claim 1 also is invalid because it defines an aggregation. See the Party Atlas argument under its SIXTH POINT, page 80 of the Party Atlas Opening Brief.

Claim 1 also is invalid because it is unsupported by a Finding that the elements thereof perform an additional and different function in combination than they perform out of it. See the argument under THIRD POINT, page 59, of the Atlas Opening Brief.

It is noted that Pursche cites *Union Switch & Signal Co. v. Kodel Electric & Mfg. Co.,* 55 F. 2d 173 (Pursche Op. Br. p. 13), which case is believed to support the Party Atlas' position that claim 1 is invalid. Claim 1 is incomplete and covers an inoperative structure. The party Pursche himself testified that his 090 plow without a means for raising and lowering the plows from the ground would be an inoperative structure. Claim 1 does not include this raising and lowering means.

It is respectfully submitted that the facts and the law clearly show that the Trial Court was correct in holding claim 1 of the 090 patent invalid.

THE TRIAL COURT DID NOT ERR IN REQUIRING EACH PARTY TO BEAR ITS OWN COSTS.

The Trial Court did not err in failing to award costs to Pursche. 35 U. S. C. A., Section 284, reads in part as follows:

> "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, *together with interest and costs as fixed by the court.*" (Emphasis added.)

Substantially the same language was used in the prior statute, 35 U. S. C. A., Section 70.

The Courts in construing these sections have uniformly held that the matter of costs in a patent infringement action rests in the sound discretion of the Trial Court.

> *Refrigeration Engineering v. York Corporation* (C. A. 9), 168 F. 2d 896;
>
> *White Cap Co. v. Owens-Illinois Glass Co.* (C. A. 6), 203 F. 2d 694, certiorari denied 346 U. S. 876.

The Trial Court decided many of the issues of this case against Pursche. It found and concluded that the new-style Atlas plows, as shown in Exhibits 20, 21 and 23, do not infringe any patents in suit and that claim 1 of the 090 patent was invalid. Note the 11 alleged errors specified in the Specification of Errors on page 4 in Pursche's Opening Brief.

> "Where a party, in a suit for infringement of a patent, is successful only in part, the court, in its

discretion, may award costs to him, award no costs, or divide the costs." 69 C. J. S., Sec. 338(b), p. 1061.

"Since these cases were consolidated for trial and neither party has entirely prevailed, it would appear that each should bear its own costs."

Q-Tips, Inc. v. Johnson & Johnson, 108 Fed. Supp. 845, 871, Affirmed 206 F. 2d 144.

The case cited by Pursche, namely, *Overman Cushion Tire Co. v. Goodyear Tire & Rubber Co.* (C. A. 2), 40 F. 2d 460, does not sustain his position. In that case the District Court awarded costs to the plaintiff who prevailed only on two claims and failed to establish the validity of a reissued patent. The patents were so related that the action was presumably tried with little or no additional expense because the reissue was involved. The Appellate Court held "* * * There was an insufficient showing by the appellant to warrant any interference *with the discretion of the trial court* in awarding full costs. * * *" (Emphasis added).

CONCLUSION.

It is respectfully submitted that the Court was correct in its holding of non-infringement, invalidity of claim 1, and in the dividing of costs; and that the portion of the Court's decision involved in the appeal by the party Pursche should be affirmed.

Respectfully submitted,

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APPENDIX 1.

Chandler et al., Patent No. 2,830,519.